85-2161

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court Of The United States

1986 TERM

MARY PETROWSKI

v.

NORWICH FREE ACADEMY, ET AL

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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A. QUESTIONS PRESENTED:

When the Connecticut Supreme Court, because of statutory time limit violations by the Freedom of Information Commission, overturned the decision of the Freedom of Information Commission holding null and void the procedure by which Mary Petrowski, a tenured school teacher, was fired, were Mary Petrowski's constitutional rights under the 14th Amendment violated and were the time limits over which Mary Petrowski had no control whatsoever constitutional as applied to her.

B. PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF THE STATE OF CONNECTICUT:

a. The Norwich Free Academy (hereinafter referred to as N.F.A.);

b. The State of Connecticut Freedom of Information Commission (hereinafter referred to as F.O.I.C.);

c. Mary Petrowski.

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D. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE:

There have been none.

E. BASIS OF JURISDICTION:

The case began as an administrative action brought by the appellant, Petrowski, before the appellee F.O.I.C.. Petrowski challenged the legality of the proceedings of the appellee N.F.A.'s Board of Trustees by which she was terminated from her position as a tenured teacher. The F.O.I.C. ruled that the actions of the trustees were in violation of the state Freedom of Information Act. It held the actions taken by the trustees null and void. The decision of the F.O.I.C. was appealed by N.F.A. to the Connecticut Superior Court, which upheld the F.O.I.C.. The issue of statutory time limits was not raised by N.F.A.. This decision was appealed to the Connecticut Appellate Court. The Connecticut Supreme Court removed this appeal to itself *sua sponte*. The Connecticut Supreme Court held that the actions of the F.O.I.C. were null and void because time limits in Connecticut General Statutes Section 1-21i(b) were not met.

The Connecticut Supreme Court on April 8, 1986 remanded the case to the Connecticut Superior Court with orders to sustain N.F.A.'s appeal. There has been no rehearing in the case. The notice of appeal to the United States Supreme Court was filed with the Connecticut Supreme Court on April 18, 1986.

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1257(2). Mary Petrowski challenged the validity of Connecticut General Statutes 1-21i(b) as interpreted by the Connecticut Supreme Court, on the grounds that it was repugnant to the Constitution in that it denied her rights to due process and to equal protection. (See memorandum of law of Mary Petrowski dated

March 12, 1986 Appendix D1). The Connecticut Supreme Court in its decision of April 8, 1986 ruled that the statute was valid. The decision by the Connecticut Supreme Court was final and left the appellant with no recourse within the Connecticut judicial system to challenge the decision or to again present her claim that the actions of N.F.A. were in violation of the Connecticut Freedom of Information Act.

F. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE:

U. S. Constitution Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 1-21i(b)

Any person denied the right to inspect or copy records under Section 1-19 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by sections 1-15, 1-18a, 1-19 to 1-19b, inclusive, and 1-21 to 1-21k, inclusive, may appeal therefrom to the freedom of information commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed within thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed within thirty days after the person filing the appeal receives notice in fact that such meeting was held. For purposes of this

subsection, such notice of appeal shall be deemed to be filed on the date it is received by said commission or on the date it is postmarked, if received more than thirty days after the date of the denial from which such appeal is taken. Upon receipt of such notice, the commission shall serve upon all parties, by certified or registered mail, a copy of such notice together with any other notice or order of such commission. Said commission shall, within twenty days after receipt of the notice of appeal, hear such appeal after due notice to the parties and shall decide the appeal within thirty days after such hearing, by confirming the action of the agency or ordering the agency to comply forthwith with such relief as the commission, in its sound discretion, believes appropriate to rectify the denial of any right conferred by said sections. If a notice of appeal concerns an announced agency decision to meet in executive session or an ongoing agency practice of meeting in executive sessions, for a stated purpose, the commission or a member or members of the commission designated by its chairperson shall serve notice upon the parties in accordance with this section and hold a preliminary hearing on the appeal within seventy-two hours after receipt of the notice, provided such notice shall be given to the parties at least forty-eight hours prior to such hearing. If after the preliminary hearing the commission finds probable cause to believe that the agency decision or practice is in violation of sections 1-18a and 1-21, the agency shall not meet in executive session for such purpose until the commission decides the appeal. If probable cause is found by the commission, it shall conduct a final hearing on the appeal and render its decision within five days of the completion of the preliminary hearing. Such order may declare any or all actions taken at any meeting to which such person was denied the right to attend null and void and may require the production or copying of any public record. In addition, said commission, upon the finding that a denial of any right created by sections 1-15, 1-18a, 1-19 to 1-19b, inclusive, and 1-21 to 1-21k, inclusive, was without reasonable grounds may, in its discretion, impose a civil penalty against the custodian or other official directly responsible for such denial of not less than twenty nor more

than five hundred dollars, after such custodian or other official has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-177 to 4-184, inclusive. If the commission finds that a person has taken an appeal to the commission under this subsection frivolously, without reasonable grounds and solely for the purpose of harassing the agency against which the appeal has been taken, it may, in its discretion, impose a civil penalty against such person of not less than twenty dollars nor more than one thousand dollars, after such person has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-177 to 4-184, inclusive. In the case of failure to pay any such penalty levied by the commission pursuant to this subsection, within thirty days of written notice sent by certified or registered mail to such person, the superior court for the judicial district of Hartford-New Britain, on application of the commission, shall issue an order requiring such person to pay the penalty imposed.

Connecticut General Statutes Section 10-151(a)

(a) For the purposes of this section:

(1) The term "board of education" shall mean a local or regional board of education or the board of trustees of an incorporated or endowed high school or academy approved pursuant to section 10-34, which is located in this state;

(2) The term "teacher" shall include each certified professional employee below the rank of superintendent employed by a board of education in a position requiring a certificate issued by the state board of education;

(3) The term "continuous employment" means that time during which the teacher is employed without any break in employment as a teacher for the same board of education;

(4) The term "full-time employment" means a teacher's employment in a position at a salary rate of fifty per cent or more of the salary rate of such teacher in such position, if such position were full-time;

(5) The term "part-time employment" means a teacher's employment in a position at a salary rate of less than fifty per cent of the salary rate of such teacher in such position, if such position were full-time;

(6) The term "tenure" means:

(A) The completion of thirty school months of full-time continuous employment for the same board of education. For purposes of calculating continuous employment towards tenure, the following shall apply: (i) for a teacher who has not attained tenure, two school months of part-time continuous employment by such teacher shall equal one school month of full-time continuous employment except, for a teacher employed in a part-time position at a salary rate of less than twenty-five per cent of the salary rate of a teacher in such position, if such position were full-time, three school months of part-time continuous employment shall equal one school month of full-time continuous employment; (ii) a teacher who has not attained tenure shall not count layoff time towards tenure, except that if such teacher is re-employed by the same board of education within five calendar years of the layoff, such teacher may count the previous continuous employment immediately prior to the layoff towards tenure; and (iii) a teacher who has not attained tenure shall not count authorized leave time towards tenure if such time exceeds ninety student school days in any one school year, provided only the student school days worked that year by such teacher shall count towards tenure and shall be computed on the basis of eighteen student school days or the greater fraction thereof equaling one school month.

(B) For a teacher who has attained tenure prior to layoff, tenure shall resume if such teacher is re-employed by the

same board of education within five calendar years of the layoff.

(C) Except as provided in subparagraph (B) of this subdivision, any teacher who has attained tenure with any one board of education and whose employment with such board ends for any reason and who is re-employed by such board or is subsequently employed by any other board, shall attain tenure after completion of sixteen school months of continuous employment. The provisions of this subparagraph shall not apply if, (i) prior to completion of the sixteenth school month following commencement of employment by such board, such teacher has been notified in writing that his or her contract will not be renewed for the following school year or (ii) for a period of five or more calendar years immediately prior to such subsequent employment, such teacher has not been employed by any board of education.

(7) The term "school month" means any calendar month other than July or August in which a teacher is employed as a teacher at least one-half of the student school days.

28 U.S.C. Section 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

G. STATEMENT OF THE CASE:

The appellant, Mary Petrowski, was employed by the appellee, N.F.A., as a physical education teacher from 1975 to 1981. By virtue of the length of service Petrowski had become a tenured teacher under Connecticut General Statutes Section 10-151(a)(6) prior to 1981. On May 21, 1981, the Board of Trustees of N.F.A. conducted a hearing concerning the possible termination of the appellant. The hearing was continued to June 17, 1981 at which time further evidence was heard. The hearing was then continued to July 2, 1981 at which time the Board of Trustees met in executive session with neither Petrowski nor her attorney present. At this meeting in executive session the Board of Trustees voted to terminate Petrowski's employment.

On July 30, 1981, within the thirty days required under Connecticut General Statutes Section 1-21i(b), Petrowski brought an appeal before the F.O.I.C. claiming that the actions of the Board of Trustees violated the Connecticut Freedom of Information Act. Petrowski requested that an expedited hearing be held. Petrowski did nothing to delay or slow the progress of the F.O.I.C.. The F.O.I.C. conducted an initial hearing on November 23, 1981, nearly four months after Petrowski filed her notice of appeal with the F.O.I.C.. The Commission

held a continued hearing on December 15, 1981. On February 23, 1983, nearly two years after the notice was filed, the F.O.I.C. sent out notice of its final decision. (See Appendix A1.) The F.O.I.C. found that the Board of Trustees had committed numerous violations of the Connecticut Freedom of Information Act, including voting on the termination of Petrowski's employment in an executive session and giving improper notice as to the July 2, 1981 hearing. The F.O.I.C. held that the actions taken at the July 2, 1981 meeting of the Board of Trustees were null and void. As this was the meeting in which Petrowski was fired, effectively Petrowski was still employed as a tenured teacher by N.F.A..

While the action before the F.O.I.C. was pending, Petrowski brought an action in the Connecticut Superior Court challenging her termination by N.F.A.. One of the issues raised in the amended complaint was the N.F.A. Board of Trustees' violation of the Freedom of Information Act. (See Appendix D2.) The Superior Court refused to take any action for violations of the Freedom of Information Act as it found that such actions "are left to the discretion of the Freedom of Information Commission" (see Appendix D3), leaving Petrowski thwarted in her efforts to have the violations addressed in a forum other than the F.O.I.C..

N.F.A. appealed the decision of the F.O.I.C. to the Connecticut Superior Court. The Court sustained the decision of the F.O.I.C..

N.F.A. appealed. On February 4, 1986, while the appeal was pending, the Connecticut Supreme Court released its decision in the case of *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498 (1986). In that case the Court held that the time periods contained in Connecticut General Statutes Section 1-21i(b), which stated that the F.O.I.C. shall within twenty days after the notice of appeal conduct a hearing and within thirty days after the hearing give its decision, were mandatory rather than discretionary. The Court

ruled that any actions taken by the F.O.I.C. where the Commission failed to act within the statutory time periods were null and void. On March 5, 1986 the Connecticut Supreme Court sent notice to the parties in this case that it was raising *sua sponte* the issue of why N.F.A.'s appeal should not be sustained in light of *Zoning Board of Appeals v. Freedom of Information Commission, supra.* This was the first time that the failure to follow the statutory time limits was raised as an issue. On March 12, 1986, Petrowski filed her memorandum of law on this issue. (See Appendix D1.) In this memorandum Petrowski challenged the validity of the statute in light of the United States Constitution's due process and equal protection clauses. Although, this was late in the proceedings, viewed as a whole, this was the first time that the time limits had become an issue and the statute's constitutionality was, therefore, promptly raised by Petrowski.

On April 8, 1986, the Connecticut Supreme Court issued its decision on this issue. (See Appendix B.) The Court sustained the appeal of N.F.A. impliedly ruling that the statute was constitutionally valid. There was no further recourse left to Petrowski. Petrowski is appealing to the United States Supreme Court from this decision.

The statute[1] violates Mary Petrowski's constitutional rights. The present case is virtually identical to *Logan v. Zimmerman Brush Co.*, 455 U.S. 442 (1982). Logan was denied an opportunity to have his employment termination reviewed because the reviewing commission failed to hold a hearing within the statutory time limits. A majority of this court found it to violate both the equal protection and due process clauses. Petrowski has an even stronger case. In addition to having a property right in her cause of action before the commission as in *Logan*, she has a property right in her continued employment as a tenured teacher, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). As in *Logan*, Connecticut General Statutes Section 1-21i(b)

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[1] Connecticut General Statutes Section 1-21.

operates to destroy this property right whenever the F.O.I.C. fails to take timely action. "The State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, at 434. The Statute has deprived Petrowski of any chance to have the Freedom of Information Act aspects of her termination presented for a hearing, in violation of her due process rights.

With this type of Statute "the state converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, . . . is the very essence of arbitrary state action." *Logan* at 442 (separate opinion of Justice Blackman). Connecticut General Statutes Section 1-21(b) makes an arbitrary distinction by denying Petrowski's claim before the F.O.I.C. merely because the F.O.I.C. failed to operate in a timely manner. Because the distinction is not based on the merits of the Petrowski case, the statute violates Petrowski's equal protection rights.

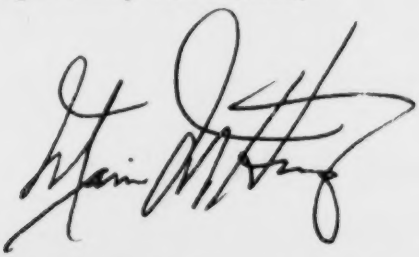
H. WHY PLENARY CONSIDERATION WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT IS REQUIRED:

The questions presented in this case deal with one of the most important basic human rights known to mankind, that of employment, the very means for survival. Mary Petrowski had a property right in her continued employment as a tenured teacher. This Court has often found that a tenured teacher has a property right in her employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Petrowski constitutionally could not have her employment terminated unless she was granted due process. The F.O.I.C. was the only avenue by which Petrowski could complain of the statutory violations of the Freedom of Information Act committed by N.F.A..

The Connecticut Supreme Court in its decision in *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 504 n.6 (1986) recognized that in some cases mandatory time requirements would violate the United States Constitution. The United States Supreme Court in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982) recognized that a mandatory time requirement could violate the due process clause of the United States Constitution. A majority also stated that such a statute would violate the equal protection clause of the United States Constitution. *Logan* is on all fours with this case. However, the Connecticut Supreme Court obviously did not agree. The exact scope of the *Logan* decision in the due process area and the extent to which the equal protection clause would operate are very important and substantial issues which should be fully resolved.

It is important that the United States Supreme Court fully consider this case in order to determine the extent to which the United States Constitution operates in this area and to restore to the appellant, Mary Petrowski, the rights which were unjustly, illegally and unconstitutionally denied her through the operation of this unconstitutional statute.

Respectfully submitted,



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APPENDIX A1

FREEDOM OF INFORMATION COMMISSION OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by Mary Petrowski,	)
Complainant(s)	) NOTICE OF FINAL DECISION
vs.	) Docket #FIC 81-137
City and Town of Norwich; Norwich Free Academy,	) February 23, 1983
Respondent(s)	)

TO: Deborah Benson for the complainant; Henry S. Cohn for the respondent.

This will serve as notice of the final decision of the Freedom of Information Commission in the above matter, as provided by § 4-183(b), G.S. At its meeting of February 9, 1983, the Commission adopted the proposed finding and order of the hearing officer as the finding and order of the Freedom of Information Commission.

By order of the Freedom
of Information Commission

/s/ Mary Jo Jolicoeur

Mary Jo Jolicoeur
Clerk of the Commission

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by Mary Petrowski,

FINAL DECISION

Complainant

Docket #FIC81-137

against

February 23, 1983

City and Town of Norwich;
Norwich Free Academy,

Respondents

The above captioned matter was heard as a contested case on November 23, 1981 and December 15, 1981, at which times the complainant and the respondent academy appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint.

At its April 28, 1982 meeting and again on November 17, 1982 the Commission reviewed the Hearing Officer's Report in this matter and voted unanimously to remand the report for further review of the record on the issue of voting in exective session.

After consideration of the entire record and additional reviews of the record as directed by the Commission, the following facts are found:

1. At hearing, the respondent academy claimed that it is not a public agency as defined in § 1-18a(a), G.S., and is therefore not subject to the jurisdiction of this Commission.

2. The respondent academy is a secondary school which exists by virtue of a corporate charter granted in 1854 by the General Assembly and which is partially endowed by private funds.

3. The property and affairs of the respondent academy are controlled and managed by a board of trustees selected under the bylaws of the respondent academy.

4. The respondent academy is a high school approved by the State Board of Education pursuant to § 10-34, G.S.

5. Article Eight of the Constitution of Connecticut states: "There shall always be free public elementary and secondary schools in the state."

6. In furtherance of this constitutional principle, the General Assembly enacted § 10-220, G.S., which requires local boards of education to implement the educational interests of the state as defined in § 10-4a, G.S.

7. The board of education of the respondent city and town of Norwich has designated the respondent academy as a facility to provide secondary education to Norwich residents, pursuant to § 10-33, G.S.

8. The respondent academy is the primary facility in the city and town of Norwich for the education of secondary school students, with a current enrollment of approximately 1,500 students. The Norwich Community School, the only other high school in the city and town of Norwich, is an "alternative" school, accommodating only 40 to 60 students.

9. Pursuant to §§ 10-33 and 10-34, G.S., the city and town of Norwich pays the whole of the tuition fees of pupils who with their parents or guardian reside in the city and town of Norwich, and who attend the respondent academy.

10. Approximately 87%of the operating cost of the respondent academy is derived from public funds. Over the past 4 years approximately 13% of the operating expenses per year has been funded by private sources.

11. Students at the respondent academy are provided with free transportation to and from school, the cost for which is paid by the city and town of Norwich, which in turn, is reimbursed by the state, pursuant to § 10-277, G.S.

12. The board of trustees of the respondent academy is required, pursuant to § 10-760, G.S., to provide special education for students of the respondent academy. The respondent academy may charge any sending town for the costs of any such special education provided to a student for whose education such town is responsible. The sending town is eligible to apply for state payment for such costs under § 10-76g, G.S.

13. Teachers at the respondent academy are eligible to participate in the state teachers' retirement system, pursuant to § 10-183b *et seq.*, G.S.

14. The respondent academy claimed that all buildings built at its campus are constructed with funds from the respondent academy or from private sources.

15. However, the respondent academy is eligible to apply pursuant to §§ 10-282 and 10-238, G.S., for school building project funds for "the construction, furnishing and equipping of any building which the town(s) of Norwich . . . may provide by lease or otherwise for use by the Norwich Free Academy . . . in furnishing education for public school pupils under the provisions of § 10-34."

16. It is found that the respondent academy is the functional equivalent of a public agency for the following reasons:

a) The respondent academy performs the important public function of implementing the educational interests of the state in providing public secondary education;

b) The respondent academy receives the majority of its funding from the government;

c) The respondent academy is subject to essentially the same government regulation as schools that receive no private endowments, and is entitled to many of the same benefits; and

d) Although the respondent academy is privately chartered, its contractural designation as a secondary school providing free secondary education for the city and town of Norwich was as a result of the government's creation of the statutory mechanism whereby such establishment was made possible.

17. It is therefore found that the respondent academy is a public agency within the meaning of § 1-18a(a), G.S., and is subject to the jurisdiction of this Commission.

18. It is found that the complainant was, at all times material to this complaint, employed as a teacher by the respondent academy.

19. It is found that, by letter dated May 8, 1981, the complainant was advised that the board of trustees of the respondent academy would probably be considering the termination of her employment, possibly during an executive session, at a special meeting on May 11, 1981. The complainant was advised of her right to attend the meeting and to have the board of trustees hear such matter in open session.

20. It is found that the complainant elected not to have consideration of the proposed termination of her employment conducted at a public meeting.

21. It is found that the respondent academy considered a recommendation that the complainant's teaching contract be terminated at meetings held as hearings on May 21, 1981 and June 18, 1981.

22. It is found that the complainant and her attorney were present at the May 21, 1981 and June 17, 1981 meetings of the board of trustees of the respondent academy.

23. It is found that the respondent academy terminated the complainant's employment contract by a decision rendered July 2, 1982.

24. By complaint filed with the Commission on July 30, 1981, the complainant alleged:

a) That a decision terminating her employment was rendered July 2, 1981 by the board of trustees of the respondent academy.

b) That the board of trustees of the respondent academy had indicated that it would meet in executive session on June 30, 1981 to decide her case.

c) That her attorney had requested that she and the complainant be allowed to attend such executive session.

d) That neither she nor her attorney had been allowed to attend the executive session scheduled for June 30, 1981.

e) That neither she nor her attorney knew where or when such executive session took place.

f) That the actions of the board of trustees of the respondent academy violated § 1-18a(e), G.S.

25. At the December 15, 1981 hearing on this matter, the respondent academy made a motion to dismiss for the following reasons:

a) On July 2, 1981, the [board of trustees of the respondent academy] met in executive session to consider the teaching contract of Mary Petrowski.

b) Mrs. Petrowski and her attorney, Deborah Benson, had presented all the testimony and opinion they desired on the matter on May 21 and June 17, 1981.

c) No testimony or opinion was required of Mrs. Petrowski or Attorney Benson on July 2, 1981.

d) Section 1-21g of the General Statutes prohibits persons, other than members of the meeting body, from attending an executive session unless such persons are to present testimony or opinion to such body.

26. The respondent academy's motion to dismiss was denied because the allegations contained in the motion do not deprive the Commission of jurisdiction over this matter, but are merely a defense to the allegations made in the complaint.

27. Also at the December 15, 1981 hearing, the complainant moved to consolidate the proceedings in her complaint with those in docket #FIC81-184, *City of Norwich v. Norwich Free Academy*, which motion was denied.

28. It is found that at its June 18, 1981 meeting, the board of trustees of the respondent academy announced that another meeting would be held, in executive session, to further consider the proposed termination of the complainant's teaching contract.

29. At hearing, there was conflicting testimony as to what date was announced for the proposed executive session referred to in paragraph 28, above, and the complaint filed with the Commission alleges that the executive session was believed to have been held on June 30, 1981.

30. It is found that on July 2, 1981, the board of trustees of the respondent academy met and voted to go into executive session to discuss the proposed termination of the complainant's employment, at which meeting neither the complainant nor her attorney was in attendance.

31. By motion dated May 10, 1982, the respondent board moved to revise the hearing officer's report to show that all parties in the matter know that the respondent board would reconvene on July 2, 1981 to discuss the complainant's employment.

32. Upon review of the record, it is found that the testimony of the complainant reflects the she was, in fact, aware that the respondent board would meet in executive session on July 2, 1981.

33. It is therefore found that at its June 18, 1981 meeting the respondent board announced that it would meet in executive session on July 2, 1981, rather than on June 30, 1981, as stated in the complainant's complaint.

34. It is found that the July 2, 1981 meeting of the board of trustees of the respondent academy was a continued hearing within the meaning of § 1-21e, G.S.

35. It is found that the respondent academy failed to prove that notice of continuance was provided as required by § 1-21e, G.S.

36. It is therefore concluded that the board of trustees of the respondent academy violated § 1-21e, G.S., when it failed to provide proper notice of the July 2, 1981 hearing, continued from a prior date.

37. It is found that when the board of trustees of the respondent academy convened in executive session on July 2, 1981, it did so with the understanding that the complainant had requested that proceedings relating to the termination of her employment be conducted in private.

38. Section 1-21g, G.S., limits attendance at executive sessions to agency members and persons invited by the agency to present testimony or opinion pertinent to matters before the agency, provided that such persons' attendance shall be limited to the period for which their presence is necessary to present such testimony or opinion.

39. It is further found that nothing in the Freedom of Information Act provides a public officer or employee with the right to be present at an executive session at which his or

her appointment, employment, performance, evaluation, health or dismissal is being discussed.

40. It is therefore concluded that the exclusion of the complainant from the July 2, 1981 executive session of the board of trustees of the respondent academy did not constitute a violation of §§ 1-18a(e)(1) or 1-21, G.S.

41. In addition, however, it is found that:

a) The respondent academy violated § 1-18a(e)(1), G.S., when it voted in executive session on July 2, 1981.

b) The respondent academy violated § 1-21, G.S., when findings of fact, conclusions, and decisions were made by the President of the Board of Trustees, although the minutes failed to disclose that said findings were voted on by the members of the board.

c) The respondent academy violated § 1-21, G.S. when it went into executive session on July 2, 1981 without stating the reasons for such executive session in its minutes.

The following order by the Commission is hereby recommended on the basis of the record concerning the above captioned matter:

1. Henceforth the board of trustees of the respondent academy shall act in strict compliance with the notice of continued hearings requirements set forth in § 1-21e, G.S. and with the requirements of § 1-18a(e)(1) and § 1-21 regarding the conduct of executive sessions and the recording of votes.

2. All actions taken at the respondent academy's July 2, 1981 meeting are hereby declared null and void.

3. The Commission notes that although technical perfection in the drafting of a complaint is not required, the lack of

precision in the drafting of the complaint in the above matter led to regrettable confusion and delay in its resolution.

Approved by order of the Freedom of Information Commission at its regular meeting of February 9, 1983.

/s/ Mary Jo Jolicoeur

Mary Jo Jolicoeur
Clerk of the Commission

APPENDIX A2

NO. 73021 SUPERIOR COURT

NORWICH FREE ACADEMY

V. JUDICIAL DISTRICT OF NEW LONDON

FREEDOM OF INFORMATION COMMISSION AND MARY PETROWSKI JUNE 17, 1985

MEMORANDUM OF DECISION

This is an administrative appeal by the plaintiff, Norwich Free Academy ("NFA"), under General Statutes Sections 1-21i(d) and 4-183 from a decision of the defendant, Freedom of Information Commission ("Commission"), declaring null and void the actions taken by NFA in terminating the defendant, Mary Petrowski ("Petrowski"), from her position as a teacher at NFA.

Pursuant to General Statutes Section 10-151(b), the Board of Trustees of NFA ("Board") held a meeting on May 11, 1981 initiating termination of employment proceedings against Petrowski. The meeting was continued until May 21, 1981. Petrowski requested that the hearings be held in private. On May 21, 1981 and June 17, 1981, private hearings were held, at which time Petrowski was present and represented by counsel.

At the June 17, 1981 meeting, the Board indicated in an off-the-record discussion that it would meet on July 2, 1981 to make a decision. The Board met on July 2, 1981 and voted to go into executive session. In the executive session the Board voted to terminate Petrowski's employment contract. Neither Petrowski nor her attorney was present at the executive session.

On July 30, 1981, Petrowski's attorney filed a complaint with the Commission alleging that her attorney had requested

that she and Petrowski be allowed to attend the meeting at which the decision was to be made, they were not allowed to do so and, in fact, did not know where or when it took place. The complaint further stated that the attorney believed the Board violated General Statutes Section 1-18a(e) and the attorney requested a hearing pursuant to Section 1-21. On November 23, 1981 and December 15, 1981, the Commission held hearings on the complaint before designated hearing officer Commissioner Helen Loy.

On March 9, 1982, in a Report of Hearing Officer, Commissioner Loy found that (1) NFA was a "public agency" under the Freedom of Information Act ("FOIA") and subject to the Commission's jurisdiction; (2) the July 2, 1981 meeting was a continued hearing and NFA failed to provide proper notice of continuation as required by General Statutes Section 1-21e; (3) NFA did not violate the FOIA by excluding Petrowski and her attorney from the Board's meeting on July 2, 1981; and (4) recommended that the Commission order NFA to henceforth strictly comply with the requirements for continued hearings under Section 1-21e.

The proposed final decision was considered by the Commission on April 28, 1982. The Commission remanded the matter to Commissioner Loy to review the record to determine whether the vote was taken in executive session and whether she considered this in her decision. On October 26, 1982, Commissioner Loy issued a Revised Report of Hearing Officer in which she (1) found that NFA was a public agency; (2) denied Petrowski's motion to amend her complaint dated May 4, 1982; and (3) recommended that the action be dismissed. At a special meeting of the Commission on November 17, 1982, Commissioner Loy withdrew the revised report for reconsideration due to inconsistencies in the findings of fact.

On January 12, 1983, Commissioner Loy issued a third and final Report of Hearing Officer. She found that NFA (1) was a public agency under the FOIA; (2) violated the FOIA by providing improper notice of continuation of the July 2,

1981 meeting; (3) did not violate the FOIA by excluding Petrowski from the Board's deliberations on July 2, 1981; (4) violated Section 1-18a(e)(1) when it voted in executive session at the July 2, 1981 meeting; (5) violated Section 1-21 when findings of facts, conclusions and decisions were made by the President of the Board, although the minutes failed to disclose that the findings were voted on by members of the Board; and (6) violated Section 1-21 when the Board went into executive session without stating the reasons for the executive session in its minutes. Commissioner Loy recommended that NFA be ordered to comply strictly with the notice of continued hearing requirements and with the statutory requirements regarding the conduct of votes and executive sessions.

The third report was considered by the Commission at a regularly scheduled meeting on February 9, 1983 at which the Commission declared null and void all actions taken by the Board at its July 2, 1981 hearing. On February 23, 1983, the Commission issued its notice of final decision, in which it incorporated Commissioner Loy's third report and declared the Board's actions null and void. It is from this decision that NFA has appealed.

The issues presented are: (1) whether the Commission properly asserted jurisdiction over NFA; (2) whether the Commission denied NFA its due process rights by finding it violated several procedural requirements of the FOIA; and (3) whether the Commission's decision to render the Board's actions null and void was contrary to law, arbitrary and an abuse of its discretion.

I.

An appeal from a decision of the Commission is authorized pursuant to Sections 1-21i(d) and 4-183. Any person who has exhausted all administrative remedies available and who is aggrieved by a final decision in a contested case may appeal to the Superior Court. Section 4-183.

The party claiming aggrievement must allege both a specific, personal and legal interest in the subject matter of the decision and that this interest has been specially and injuriously affected by the decision. *Bakelaar v. West Haven,* 193 Conn. 59, 65 (1984). NFA is aggrieved by the final decision of the Commission and may properly appeal to this court.

II.

Pursuant to Section 1-21i(d), appeals from decisions of the Commission are governed by the Uniform Administrative Procedure Act ("UAPA"), which provides in Section 4-183(g) that the "court shall not substitute its judgment for that of the agency as to the weight of the evidence in questions of fact". Thus, on review, the function of the court in reviewing the Commission's decision is not to draw its own conclusions upon the subordinate facts, but rather to determine whether the Commission acted illegally, arbitrarily or in abuse of its discretion and whether the Commission's decision was supported by the evidence in the record. *Board of Trustees of Woodstock Academy v. Freedom of Information Commission,* 181 Conn. 544, 548–49 (1980). The burden of proof that the Commission acted improperly is upon the plaintiff. *Whittaker v. Zoning Board of Appeals,* 179 Conn. 650, 654 (1980).

NFA alleges that it is not a "public agency" within the meaning of the FOIA and, therefore, is not subject to the jurisdiction of the Commission. A "public agency" is defined in General Statutes Section 1-18a(a) in part, as follows:

> (A)ny state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, . . .

A "functional equivalent" test is used to determine if hybrid public/private agencies such as NFA are public agencies within the meaning of the FOIA. *Board of Trustees of Woodstock Academy v. Freedom of Information Commission, supra* at 554. Four criteria were considered in the *Woodstock Academy* case to determine if an entity is so involved with state and local governments that it should be subject to the FOIA: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.

The circumstances surrounding the operation of NFA are nearly identical to the operation of Woodstock Academy which the court found in the *Woodstock Academy* case to be a public agency. Virtually all of the students in Norwich who seek a free secondary education attend NFA; thus, the school performs a basic governmental function. NFA is nearly entirely (eighty-seven percent) publicly financed. NFA had its operations examined and certified by the state board of education so as to be eligible for reimbursement for tuition fees by local towns. Finally, NFA is an entity created by statute for the sole purpose of maintaining a school.

The Court finds that NFA is a public agency for purposes of the FOIA and is subject to the jurisdiction of the Commission. Therefore, this matter was properly brought before the Commission.

III.

NFA claims that the Commission violated its due process right by finding violations of the FOIA regarding matters which were not actually litigated and about which NFA had no notice or an opportunity to defend itself.

In a contested case before an administrative agency, all parties shall be afforded an opportunity for a hearing after

reasonable notice, which shall include "a short and plain statement of the matters asserted." General Statutes Section 4-177 (b)(4). "(T)he notice of charges against a party whose rights are to be adjudicated by an agency must state the charges with sufficient particularity so that he is fairly apprised of the nature of the charges and may prepare his case." *Adamchek v. Board of Education*, 174 Conn. 366, 369 (1978).

The complaint filed by Petrowski with the Commission alleged, in pertinent part:

> The Board of Trustees, who held the meetings indicated that they would meet on June 30, 1981 in executive session to decide her case. As her attorney, I requested that Mrs. Petrowski and I be allowed to be present at the June 30, 1981 meeting. We were not so allowed, and in fact are not positive where or when the meeting took place. I believe this is in violation of Connecticut General Statutes Section 1-18a(e).
>
> Therefore, I request a hearing pursuant to Connecticut General Statutes Section 1-21. . . .

The charges set forth in the complaint relate to a particular executive session and formed the basis of the violations found by the Commission.

The cases cited by NFA in support of its claim are distinguishable from the present situation. In *Adamchek v. Board of Education, supra* at 370, the court found that the plaintiffs, two nontenured teachers, did not receive hearings which met statutory and due process standards. The court stated that the evidence introduced at each plaintiff's hearing, which consisted of two neutral documents, was insufficient to support the charges that the plaintiffs' performance did not meet the expected standard of teaching. The evidence in support of the findings of the Commission in the present case is substantial and is sufficient to support the charges made in Petrowski's complaint.

In *Hart Twin Volvo Corp. v. Commissioner of Motor Vehicles,* 165 Conn. 42, 48 (1973), the court found error had been committed by the Commissioner of Motor Vehicles when the offense alleged and the offense found were separate and distinct in point of time and in factual detail. The violations found by the Commission in the present case concern the same executive session referred to in the complaint.

NFA finally cites *West Hartford v. Commission of Human Rights and Opportunities,* 176 Conn. 291 (1978), in support of its argument. In *West Hartford,* the plaintiffs brought an action alleging pay discrimination based on a disparity between communications center operators and previously employed fire dispatchers who performed substantially the same work. The tribunal and the lower court awarded back pay to the operators based, however, upon finding discriminatory differentials between the operators and a remaining uniformed dispatcher who acted as a supervisor. In reversing the decision, the court stated that the notice to the town in the complaint so narrowed the issues that it cannot be fairly said that it was on notice as to all possible claims with regard to pay. *Id.* at 297. The situation in the present case is distinguishable from *West Hartford* in that Petrowski's complaint did not narrow the factual issues as did the complaint in *West Hartford.*

The Court finds that the charges of Petrowski's complaint are stated with sufficient particularity to fairly apprise the plaintiff of the nature of the allegations pending and the Commission, therefore, did not violate the due process rights of NFA.

IV.

NFA claims next that the Commission found violations in excess of its statutory authority, used unlawful procedures in making its findings, and made findings unsupported by substantial evidence.

A. NFA claims that it did not violate Section 1-21e by providing improper notice of continuation for the July 2, 1981 meeting.

Section 1-21e, when read in conjunction with Sections 1-21 and 1-21d, requires that within 24 hours after a hearing is continued, notice of the time and place of the continued hearing must be posted on or near the door of the place where the original hearing was held. The notice also must be posted in either the secretary of state's office or the town clerk's office, at least 24 hours in advance of the continued hearing. Moreover, notice must be delivered prior to the continued hearing to the usual place of abode of each member of the public agency.

The record indicates that notice was not given in accordance with Section 1-21e and the Commission, therefore, acted within the scope of its power in finding that the Board violated Section 1-21e.

B. NFA next claims that the Commission erred in finding that NFA violated Section 1-21 when it failed to state in the minutes the reasons for the July 2, 1981 executive session.

Section 1-21 provides that a public agency may hold an executive session, as defined in Section 1-18a(e), upon an affirmative vote of two-thirds of the members present and voting, taken at a public meeting and stating the reasons for such a session, as defined in Section 1-18a(e).

NFA argues that the reasons for the executive session appear from the minutes of the meeting. However, the minutes of the meeting do not include the reasons for the executive session and the Commission's finding, therefore, is supported by the record and must stand.

C. NFA also claims that its due process rights were violated when the Commission found the Board had violated

Sections 1-18a(e)(1) and 1-21 by conducting a vote concerning Petrowski's termination while in executive session.

Section 1-21 provides that meetings of all public agencies, except executive sessions, as defined in Section 18a(e), shall be open to the public. Section 1-18a(e) provides that executive sessions include the following purpose: "(1) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, . . ."

The FOIA expresses a strong legislative policy in favor of open government and free public access to government records. *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 328 (1980). Disclosure is the general rule and exceptions to that rule will be narrowly construed in light of the underlying purpose of the act. *Id.* at 329.

Section 1-18a(e)(1) provides only for *discussion* while in executive session and failure to conduct a vote while in a public hearing violates Section 1-21.

NFA further argues that the policies of General Statutes Section 10-151 (Teacher Tenure Act) supercede the general policies of the FOIA, and require that the Board vote on Petrowski's termination while in executive session. In *Board of Education v. Freedom of Information Commission*, D.N. 174900, Fairfield Judicial District, Memorandum of Decision on Appeal, June 6, 1980, Zarrilli, J., the court stated that Section 10-151 harmonizes when read together with Section 1-18a and they form one consistent body of law in that Section 10-151(b) says nothing about whether the board is to reach a decision in a public or private session and that this silence is answered by Section 1-18a(e) which allows discussion in executive session unless the employee opts for an open meeting.

The Court finds that the Commission was correct in concluding that the Board is not permitted to vote while in executive session. Therefore, the Commission's findings on this issue must stand.

D. NFA also claims that the Commission acted in excess of its statutory authority when it found that NFA had violated Section 1-21 ". . . when findings of fact, conclusions, and decisions were made by the President of the Board of Trustees, although the minutes failed to disclose that said findings were voted on by members of the Board."

The votes of each member of a public agency upon any issue shall be recorded in the minutes of the session at which taken. Section 1-21. The minutes of the Special Meeting of the Board of Trustees of NFA on July 2, 1981 stated, in part, "(a)fter extended discussion, it was unanimously voted that the employment contract of Mary A. Petrowski, a member of the faculty at Norwich Free Academy, be terminated immediately. . ." The names of the members who attended the meeting are set forth in the minutes; and since it is possible to determine how each member voted with no more than a reasonable amount of mental effort, the minutes comply with the requirements of Section 1-21. *Pape v. McKinney*, 170 Conn. 588, 598 (1976).

The Court finds, therefore, that the Commission was in error in finding that the Board violated Section 1-21 on the basis that the minutes failed to disclose the votes of the members of the Board on the findings and dismisses the Commission's finding as to such violation.

V.

NFA alleges that the Commission acted arbitrarily and in abuse of its discretion by declaring null and void the actions taken by the Board at the July 2, 1981 meeting.

Section 1-21i(c) provides, in part, that if the Commission "determines that notice was improper, it may, in its sound discretion, declare any and all actions taken at such meeting null and void." The failure of the Board to give proper notice to Petrowski of the continued hearing was a substantial denial

of her rights under the FOIA and the Commission, therefore, was within its discretion in declaring the Board's decision to terminate Petrowski's employment null and void. See *Lebanon v. Wayland*, 39 Conn. Sup. 56, 62 (Super. Ct. 1983).

NFA alleges finally that the Commission violated General Statutes Section 4-179 of the UAPA by rendering a decision without providing it with an opportunity to file exceptions and present briefs and oral argument. Section 4-179 provides, in part:

> When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for the decision is served upon the parties, and an opportunity afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.

The Report of Hearing Officer, dated January 12, 1983, issued by Commissioner Loy is a proposal for decision to which NFA had time to respond prior to the final decision of the Commission. Moreover, the issue of declaring the Board's actions void was addressed in Commissioner Loy's final report in which she declined to propose such an order. Finally, at the February 9, 1983 meeting of the Commission, this issue was addressed by the Commission and by NFA's counsel.

The Court finds that NFA had notice that the issue of declaring the Board's actions null and void was addressed in the proposal for decision and, therefore, the Commission did not act in violation of the UAPA.

VI.

For the reasons stated above, the decision of the Commission is affirmed and the appeal is dismissed.

/s/ Hendel, J.

Hendel, J.

APPENDIX B

No. 12809

NORWICH FREE ACADEMY	: SUPREME COURT
V.	: STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION ET AL.	: APRIL 8, 1986

ORDER

AFTER HEARING ON THE SOLE QUESTION WHY NORWICH FREE ACADEMY'S APPEAL SHOULD NOT BE SUSTAINED IN LIGHT OF *ZONING BOARD OF APPEALS V. FREEDOM OF INFORMATION COMMISSION*, 198 CONN. 498 (1986), IT IS HEREBY ORDERED THAT THE JUDGMENT BE AND HEREBY IS SET ASIDE AND THE CASE IS REMANDED TO THE SUPERIOR COURT WITH DIRECTION TO SUSTAIN NORWICH FREE ACADEMY'S APPEAL.

BY THE COURT,

BY /s/ Carolyn S. Cunha
Assistant Clerk-Appellate

Notice sent: April 8, 1986
Moller, Horton & Fineberg, P.C.
Siegel, O'Connor & Kainen, P.C.
Marvin Horwitz
Freedom of Information Commission
Trial Court (New London CV83-0073021S)
Hon. Seymour L. Hendel

APPENDIX C

NO: 12809 : SUPREME COURT

NORWICH FREE ACADEMY, APPELLANT : STATE OF CONNECTICUT

vs.

FREEDOM OF INFORMATION COMMISSION and MARY PETROWSKI, APPELLEES : APRIL 17, 1986

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mary Petrowski, an Appellee above-named, hereby appeals to the Supreme Court of the United States from the order of the Supreme Court of the State of Connecticut, entered in this action on April 8, 1986, sustaining the appeal of the Norwich Free Academy.

1. This appeal is taken pursuant to 28 USC § 1257(2).

2. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in the transcript the following:

a. A copy of the transcript of arguments before the Supreme Court;

b. A copy of all Briefs and Memoranda of Law submitted to the Court in the case;

c. Items of the record below which have been submitted to the Supreme Court.

THE APPELLEE
MARY PETROWSKI

BY

.....

MARVIN M. HORWITZ
For HORWITZ, MARUZO, LUCAS
& DRISCOLL
Her Attorneys

I, Marvin M. Horwitz, an attorney in the office of Horwitz, Maruzo, Lucas & Driscoll, attorneys of record for Mary Petrowski, Appellant herein, depose and say that on the 17th day of April, 1986, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States:

On the Norwich Free Academy, Appellee herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid to Alexandra Davis, Esq., of Moller, Horton and Fineberg, P.C., counsel of record for said Norwich Free Academy, located at 90 Gillette Street, Hartford, Connecticut, 06105.

On the Norwich Free Academy, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Siegel, O'Connor, Schiff, Zangari and Kainen, P.C., counsel of record for said Norwich Free Academy, located a 370 Asylum Street, Hartford, Connecticut, 06103.

On the State of Connecticut Freedom of Information Commission, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Theresa A. Hopkins, Commission Counsel, at the offices of the Commission, located at 97 Elm Street—Rear, Hartford, Connecticut, 06106.

.....

MARVIN M. HORWITZ

Subscribed and sworn to, before me, at Norwich, Connecticut this 17th day of April, 1986.

.....

PATRICIA J. ROBERSON
Notary Public

APPENDIX D1

NO. 12809 : SUPREME COURT

NORWICH FREE ACADEMY : STATE OF CONNECTICUT

vs.

FREEDOM OF INFORMATION
COMMISSION, ET AL : MARCH 12, 1986

MEMORANDUM OF LAW

ISSUE:

Why Norwich Free Academy's appeal should not be sustained in light of Zoning Board of Appeals of the Town of North Haven v. Freedom of Information Commission, et al, 198 Conn 498 (1986).

FACTS:

On July 30, 1981, the defendant Mary Petrowski requested a hearing before the defendant FOIC concerning the plaintiff Norwich Free Academy. She requested an expedited hearing. Hearings were held on November 23, 1981 and December 15, 1981. On February 23, 1983, the defendant Freedom of Information Commission issued its final decision in the case. The defendant Petrowski also brought an action against the Norwich Free Academy in the Superior Court.[1] In her Amended Complaint, there Mrs. Petrowski raised the same issue that was before the FOIC. The Court refused to consider this issue, stating it was for the FOIC to decide. That case is awaiting the decision of this Court.[2] On February 4, 1986, the Connecticut Supreme Court held in *Zoning Board of Appeals of the Town of North Haven v. Freedom of Information Commission, et al,* 198 Conn. 498 (1986), that the requirements of Connecticut General Statutes § 1-21i(b) were mandatory and not directory and that the failure of the FOIC

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[1] G.A. 10, Docket Number 066156

[2] Docket Number 212622

to follow these requirements resulted in it having no jurisdiction to hear a matter.

ARGUMENT:

The actions of the FOIC in the present case did not occur within the time frames set down in Connecticut General Statutes § 1-21i(b). The only issue now is whether or not this language must be treated as mandatory rather than directory in *this* case. In *Zoning Board of Appeals, supra.,* the court held that the language was mandatory. However, to do so in this case would violate the defendant Mary Petrowski's constitutional rights.

The *Zoning Board of Appeals* decision noted that in some cases the language could not be construed as mandatory and thereby cut off all rights of a claimant. In Footnote 6 the court noted that in some cases interpretation of time requirements must be directory under the case of *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 Sup. Ct. 1148, 71 L. Ed. 2d 265 (1982). The court went on in Footnote 6 to decide there were no constitutional problems as, "The Complainant here was not deprived of her due process rights. She did not assert a vital liberty or property interest, she merely sought to reverse the decision of the ZBA." *Zoning Board of Appeals,* at 504. What is at stake in the present case is much more than just the reversal of a Zoning Board of Appeals decision, but rather it is the issue of whether or not a tenured teacher can continue employment.

The majority opinion in *Logan v. Zimmerman Brush Co., supra.,* determined that a requirement of holding a hearing within a 120 day period violated the due process rights of one who was contesting his discharge from employment. The statute in that case stated "Within 120 days of the proper filing of a charge, the Commission *shall* convene a fact-finding conference. . ." *Logan v. Zimmerman Brush Co,* at 427. This is precisely the same language in the Connecticut General Statutes § 1-21(b). Nevertheless, the United States Supreme Court refused to allow that provision to be mandatory, as such

an interpretation would violate the claimant's due process rights. The Court found the claimant had a property right in having his employment termination reviewed. Likewise, in the present case, the defendant, Mary Petrowski, has a property interest in the continuing validity of the FOIC's decision, as it will affect her employment status with the plaintiff, Norwich Free Academy. Mrs. Petrowski was a tenured teacher, a status long recognized as a property right requiring due process protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). As the defendant, Mary Petrowski, has a property right in continued employment, this property right cannot be taken away without due process.

If the Connecticut General Statutes are read to make the time period mandatory on the FOIC in this case, the defendant Mary Petrowski will have been deprived of her property right without being given the process which is due her. Just as in the *Logan* case, Mrs. Petrowski will be denied a form of redress solely because the State has failed to act. As the Court stated, "The deprivation here is final: [The claimant] unlike a claimant whose charge is dismissed on merits for lack of evidence, cannot obtain judicial review of the Commission action. A system of procedure that deprives persons of their claims in a random matter, as is apparently true of [the statute there involved], necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan*, at 434–435. The Court there found that State interests in expediting settlement was not an interest which was sufficiently met by a mandatory time period statute to offset the violation of the claimant's property rights. If a claimant before the FOIC has a property interest in his or her claim, the statute cannot be considered mandatory, but must rather be considered directory for due process reasons.

Mary Petrowski has not contributed to the situation in which she would find herself if the FOIC decision was vacated. First, she had no control over the time within which the FOIC would operate. Second, she attempted in another judicial

proceeding to raise the issue which was brought before the FOIC, only to have the Court refuse to hear the issue. The FOIC was the only method of redress which the defendant Mary Petrowski had upon this particular issue.

As the separate opinions in the *Logan* case point out, there are equal protection problems with a mandatory time limit. The State, through the FOIC, by not meeting the time constraints in some cases, irrationally classifies certain claimants as to whether or not their claim can be heard based not on the merits of their claim but on the actions of the state agency. This cannot be done under the equal protection clause.

It is clear that the language in Connecticut General Statutes § 1-21(b) must be considered discretionary rather than mandatory in this case, or it will violate the defendant Mary Petrowski's constitutional rights.

THE DEFENDANT
MARY PETROWSKI

BY /s/ William N. Sebastian

WILLIAM N. SEBASTIAN
For HORWITZ, MARUZO, LUCAS
& DRISCOLL
74 W. Main St., P.O. Box 940
Norwich, CT 06360
(203) 889-3351
Her Attorneys

I hereby certify that a copy of the foregoing was mailed on March 12, 1986 to all counsel and pro se parties of record.

/s/ William N. Sebastian

WILLIAM N. SEBASTIAN

APPENDIX D2

DOCKET #66156

MARY PETROWSKI	: STATE OF CONNECTICUT
v.	: SUPERIOR COURT
NORWICH FREE ACADEMY ET AL	: JUDICIAL DISTRICT OF NEW LONDON AT NORWICH

AMENDED COMPLAINT

1. The plaintiff has been employed by the defendant, Norwich Free Academy, a specially chartered corporation, as a teacher for the period from December, 1974 through July, 1981.

2. The Board of Trustees of The Norwich Free Academy is the governing body of the Norwich Free Academy.

3. Norwich Free Academy is a privately endowed high school approved pursuant to Connecticut General Statutes § 10-34.

4. The plaintiff is a tenured teacher pursuant to Connecticut General Statutes § 10-151.

5. The professional employees of Norwich Free Academy have elected to come under the provisions of § 10-151 as provided by § 10-1531.

6. The plaintiff was notified by letter dated May 8, 1981, that termination of her contract was under consideration by the defendant.

7. The plaintiff, pursuant to Connecticut General Statutes § 10-151(b) requested a written statement of reasons why the termination of her contract was under consideration and requested a hearing.

8. In response to plaintiff's request for a written statement of reasons, the said Trustees responded by a letter dated May 12, 1981, containing the alleged reasons.

9. The hearing on the termination of plaintiff's contract commenced on May 21, 1981, and continued on June 17, 1981. The said Trustees further considered the matter in a meeting on July 2, 1981. Despite plaintiff's request, neither she nor her counsel were allowed to attend the meeting held on July 2, 1981.

10. James J. Dutton, Philip G. Camp, Jr., Bernard R. Enright, John W. Friswell, Benjamin J. Lord, Leonard D. Royce, Wayne G. Tillinghast, and Anthony D. Tramontozzi, Jr., who are Trustees, were present at the hearings held May 21, 1981, and June 17, 1981, and July 2, 1981.

11. Said hearing was held under the authority and pursuant to Connecticut General Statutes § 10-151.

12. The Trustees rendered a decision on July 2, 1981.

13. The Trustees terminated the employment contract of the plaintiff.

14. The plaintiff has brought this action to appeal said decision pursuant to Connecticut General Statutes § 10-151(f).

15. The defendant, in its termination of the plaintiff's contract, acted in violation of Connecticut General Statutes § 10-151(b) in one or more of the following respects:

(a) The defendant acted illegally, arbitrarily and in abuse of its discretion.

(b) The defendant violated statutory provisions in that there is no "cause" as defined in Connecticut General Statutes, § 10-151(b) to support such termination.

(c) The defendant's decision was clearly erroneous in view of the reliable and substantial evidence on the whole record.

(d) The defendant violated the plaintiff's constitutional rights, in that it deprived plaintiff of a property interest without due process of law.

(e) The defendant violated plaintiff's constitutional and statutory due process rights in that it admitted hearsay evidence.

(f) The defendant acted without a quorum since two of the Trustees hearing the case (Tillinghast and Dutton) were disqualified because their law firm, Brown, Jacobson, Jewett and Laudone, P.C., represents the Norwich Free Academy in other pending matters.

(g) The defendant knowingly and willfully violated the plaintiff's rights to due process under the Fourteenth Amendment to the United States Constitution in that it stated that it could not and did not intend to be the impartial tribunal required by the Amendment.

(h) The defendant violated the plaintiff's rights to due process under the Freedom of Information Act, Connecticut General Statutes § 1-18a(e), in not allowing the plaintiff or her attorney to be present at the July 2, 1981, meeting held in private.

(i) The defendant violated the plaintiff's constitutional rights because it was not an impartial tribunal due to the fact that the Administration of the Norwich Free Academy and the Trustees of the Norwich Free Academy are represented by the same attorney and law firm in labor relation matters. The plaintiff was prosecuted by the same attorney who advises the defendant, its administration, and the said Trustees.

(j) The defendant discriminated against the plaintiff, in violation of her civil and constitutional rights, in that it treated plaintiff and another Norwich Free Academy teacher, Sandra Bosko, who was engaged in a similar hearing, differently in the following ways: Bosko's pay was continued during the duration of her hearing and plaintiff's was not, although both teachers were suspended without prejudice; Bosko and her attorney were allowed to be present on the day the Board of Trustees met to make its decision regarding Bosko, plaintiff and her attorney were not allowed to be present at the decision regarding Petrowski.

(k) The defendant acted arbitrarily in terminating plaintiff's contract in that the allegations involved misconduct by the plaintiff and certain students, yet no student was punished or disciplined by the school. This was in return for the students' testimony against the plaintiff.

16. The plaintiff is aggrieved by the decision of the defendant.

WHEREFORE, the plaintiff claims as relief an order of this Court:

(a) Reversing the decision of the defendant and ordering her reinstatement to her position of employment;

(b) Providing such other relief as equity would grant.

(c) Costs.

APPENDIX D3

DOCKET #66156

MARY PETROWSKI	: STATE OF CONNECTICUT
v.	: SUPERIOR COURT
NORWICH FREE ACADEMY ET AL	: JUDICIAL DISTRICT OF NEW LONDON AT NORWICH

MEMORANDUM OF DECISION

The defendant's Board of Trustees terminated the plaintiff's contract. The plaintiff appeals the action of the defendant Board.

After hearing, the Board found that the plaintiff was a tenured teacher and a successful gymnastics coach; that she had intimate physical contact with Stephen Donahue, a minor student at the defendant Academy; that she had allowed Stephen Donahue to purchase alcoholic beverages with her money and in her presence; that she consumed alcoholic beverages with Stephen Donahue in the presence of four Academy students, three of whom were minors; and, that she had taken Stephen Donahue to a gymnastics meet, even though he was inexcusably absent from school, failed to follow Academy procedure for having him excused, and later "covered for him" by writing a note to the attendance officer.

The defendant Board further found that the plaintiff's failure to stop students from consuming alcoholic beverages, providing and consuming alcoholic beverages with a minor student, intimate physical contact with a student, and, failure to follow established procedures for removing a student from class demonstrate unprofessional and immoral conduct involving students.

Based upon these conclusions, the Board voted unanimously to terminate the plaintiff's contract.

The plaintiff in her appeal claims (a) the defendant acted illegally, arbitrarily and in abuse of its discretion; (b) there was no "cause" as defined in C.G.S. 10-151(b) to support the termination; (c) there was insufficient evidence to support the defendant's decision; (d) the defendant violated the plaintiff's right to due process in that it stated it could not, and did not, intend to be impartial; (e) the defendant discriminated against the plaintiff by treating her differently from another teacher who was engaged in a similar hearing at approximately the same time; (f) the defendant admitted hearsay evidence; (g) because two members of the Board were disqualified, a quorum was lacking; (h) the plaintiff's due process rights were violated in not allowing the plaintiff or her attorney to be present at a meeting of the Board on July 2, 1981; and, (i) although a reason for terminating the plaintiff's contract was alleged misconduct with students, no student was punished.

The defendant, in its answer, admits allegations contained in the amended complaint that the plaintiff was employed by the defendant as a teacher from December, 1974 through July, 1981; that the Board of Trustees is the defendant's governing body; that the defendant is a privately endowed high school approved pursuant to Section 10-151 of the C.G.S.; and, that on July 2, 1981, the Board of Trustees rendered a decision terminating the plaintiff's employment contract.

I

In sub-paragraphs (f) and (g) of paragraph 15 of the amended complaint, the plaintiff raises questions of impartiality and conflict of interest arising out of the allegations that two of the eight members of the Board of Trustees named in paragraph 10 are attorneys whose law firm is the attorney for the defendant.

The hearing was started on May 21, 1981 and concluded on June 17, 1981.

At the beginning of the June 17th hearing plaintiff's counsel asked that two of the trustees, Attorney Dutton and Tillinghast, disqualify themselves from hearing the case because the law firm of Brown, Jacobson, Jewett and Laudone (of which Dutton and Tillinghast were members) represented the defendant. Although a different law firm represented the defendant in the instant case as it did in other union matters, it was the plaintiff's claim that the representation of the defendant by the Brown-Jacobson office in other matters unrelated to the instant case required attorneys Dutton and Tillinghast to disqualify themselves from serving on the Board of Trustees. Plaintiff's counsel expressly stated that she was not suggesting impropriety.

(At that time plaintiff's counsel stated, as a further ground for disqualification, that the plaintiff, prior to engaging her as counsel, consulted with another member of the Brown-Jacobson firm and that member had interviewed Stephen Donahue. The plaintiff has not pursued this claim so the court deems she has abandoned it.)

Attorney Tillinghast's reply to plaintiff's request for disqualification on the ground of lawyer-client relationship between his firm and the defendant reads, in part as follows:

". . . (Y)ou recognize that the very law that allows the Board of Trustees to hear this case does away with the concept of any impartial judgment. That has no connection. We are all Trustees of the Academy sitting here and we are close to the administration and faculty, so there is no pretension that we would be impartial and I don't intend to disqualify myself."

Attorney Dutton also saw no reason for disqualification. Each of the other trustees was polled and each stated he saw no impropriety.

The court took testimony from Attorney Tillinghast on the issue of disqualification.

As part of his testimony, he explained further the meaning of his comments at the hearing. He explained that his partner's representation of the defendant did not make his relationship to the defendant any closer than that of any other trustee; that, unlike a judge who does not know any of the parties, the trustees know about the workings of the Academy, and yet, the law permitted the trustees to hear the case; and, that the plaintiff refused the option given by statute to have her case heard by an impartial panel of arbitration, as opposed to having it heard by trustees who know some of the parties and know the workings of the Academy.

He testified further that he did not at any time indicate that he was going to be unfair or that he had prejudged the case; nor, in fact, had he prejudged the case or was he unfair to the plaintiff.

In oral argument before the court, in response to a question by the court, plaintiff's counsel argued that the trustees who were members of a law firm that represented the Academy might be fearful of losing the Academy as a client by not upholding the administration's charges against a teacher.

The court finds that the law firm of Brown, Jacobson, Jewett and Laudone did represent the defendant from time-to-time on relatively minor acquisitions or disposal of real estate; that the firm considered the defendant a representative client for purposes of advertising in legal publications; that, at about the time of the hearings, one of the members of the firm was retained by the defendant's insurer to represent the defendant who was being sued in a tort case; that the insurer, and not the defendant, was obligated to pay the firm's fees; that Atty. Tillinghast was not prejudiced against the plaintiff nor had he prejudged the case; and, that there was no evidence that Attorney Dutton was prejudiced against the defendant, or in any way unfair to her.

The personal interests of Trustees Tillinghast and Dutton in the outcome of the proceedings were too remote and nebulous to have required their disqualification, *Dana-Robin Corp. vs. Common Council*, 166 Conn. 207; *Anderson vs. Zoning Commission*, 157 Conn. 285.

II

In sub-paragraph (b) of paragraph 15 of the amended complaint, the plaintiff alleges there was no cause as defined in C.G.S. 10-151(b) to support the termination.

In the Board's memorandum of decision, it found that the plaintiff's failure to stop students from consuming alcoholic beverages, providing and consuming alcholic beverages with a minor student, intimate physical contact with a student, and failure to follow established procedures for removing a student from class demonstrated unprofessional and immoral conduct involving students. For these reasons, it terminated the plaintiff's contract.

Section 10-151(b) limits the grounds on which a tenured teacher's contract may be terminated. Sub-section (3) permits termination for "moral misconduct", and, sub-section (6) for "other due and sufficient cause."

The acts of the plaintiff, as found by the Board, do constitute a series of varied acts of impropriety on the part of the plaintiff, thereby justifying termination of the plaintiff's contract. *Tucker vs. Board of Education*, 177 Conn. 572.

III

In paragraph 15(c) of the amended complaint the plaintiff claims the defendant's decision is not supported by the evidence.

"Conclusions reached by an administrative board must be upheld by the trial court if they are supported by the evidence that was heard. The credibility of witnesses and the determination of issues of fact are matters within the province of the administrative board." *Balch Pontiac Buick, Inc. vs. Commissioner of Motor Vehicles,* 165 Conn. 559.

The evidence before the board was sufficient to support the board's findings of fact.

IV

In paragraph 15(j) of the amended complaint, the plaintiff alleges discriminatory treatment of the plaintiff in that the Board had treated the plaintiff differently from another teacher against whom charges had been brought. The alleged discriminatory treatment consisted of continued salary payments to the other teacher while her case was pending before the Board, and, the other teacher and her attorney were permitted to be present at the executive session of the Board at which the Board decided her case.

Although the Board at first withheld salary payments to the plaintiff after it had suspended her without prejudice, it later paid her in full for the period of time she was suspended. The issue of discriminatory treatment in that respect is, therefore, moot.

The Board had the discretion to invite, or not invite, the plaintiff or her attorney. Section 1-219, C.G.S. It decided not to invite either of them in accordance with its discretion.

V

In paragraph 15 (e) of the amended complaint, the plaintiff alleges violation of due process by the admission of hearsay.

The plaintiff complains of hearsay in two different areas of testimony. In neither does the court find her objections well taken. In one area, the witness testified as to what another party had said to explain the witness' motive; in the other, the alleged hearsay testimony had to do with the credibility of another witness who had made contradictory statements.

In addition, there was other sufficient competent evidence to sustain the Board's conclusion. *Sumara vs. Sifuor Control Commission,* 165 Conn. 26.

VI

In paragraph 15 (h) of the amended complaint, the plaintiff alleges the defendant violated the Freedom of Information act in not allowing the plaintiff or her attorney to be present at the July 2nd meeting.

Section 1-18a (e) of the C.G.S. permits the public to be excluded from executive sessions of a public agency where the dismissal of a public officer or employee is discussed, provided that such individual may require that discussion be held at an *open* meeting. There was no evidence of the plaintiff requesting an *open* meeting. The plaintiff's request was that she and her attorney be allowed to be present.

Section 1-21 g of the Connecticut General Statutes limits attendance at an executive session to members of the body and persons invited by said body. The issue of violation of the Freedom of Information Act is presently pending before the Freedom of Information Commission.

In addition, the Board's refusal to allow the plaintiff or her attorney to be present during the Board's deliberations did not deprive the plaintiff of a fair hearing. The Freedom of Information Act's primary purpose is to extend the public's right to know. Sanctions for a violation of that act are left to the discretion of the Freedom of Information Commission. Sec. 1-21i(1).

The court finds the defendant did not act illegally, arbitrarily or in abuse of its discretion.

The appeal is dismissed.

HARRY W. EDELBERG,
JUDGE

Filed May 6, 1982.

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2161

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

MARY PETROWSKI, *Appellant*

v.

NORWICH FREE ACADEMY, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS

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QUESTIONS PRESENTED ON MOTION TO DISMISS

1. Is a substantial federal due process question raised concerning *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where the appellant was not prevented from asserting her claims of unlawful termination in her statutory appeal from the dismissal order, but was merely prevented from pursuing a collateral attack before the state freedom of information agency?

2. Is a federal question properly raised where the appellant does not directly assert that a statute is unconstitutional, and where the appellant refers to due process but does not state whether she is referring to the U.S. or Connecticut Constitution or both?

PARTIES TO PROCEEDINGS BELOW

The appellant has properly named all such parties.

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IN THE

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MARY PETROWSKI, *Appellant*

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ON APPEAL FROM THE SUPREME COURT
OF CONNECTICUT

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the United States Supreme Court, appellee Norwich Free Academy moves that this appeal be dismissed on the grounds that:

(1) it does not present a substantial federal question; and

(2) the federal question sought to be reviewed was not properly raised and was not expressly passed on.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The appellant has properly quoted such provisions in her jurisdictional statement, pp. 2-7 (J.S. 2-7).

STATEMENT

The appellant's statement should be supplemented as follows:

Petrowski's complaint to the Connecticut Freedom of Information Commission is reproduced in an appendix to this brief (app. 1a). It complains that the Norwich Free Academy board indicated it would meet on June 30, 1981 in executive session to decide the case, that she and her attorney requested permission to attend the meeting on June 30th, that permission was denied, and that she was not positive when or where the meeting took place.

The F.O.I.C. found Petrowski "was, in fact, aware that the respondent board would meet in executive session on July 2, 1981." (J.S. 8A, para. 32). It also concluded that "exclusion of the complainant from the July 2, 1981 executive session of the board of trustees of the respondent academy did not constitute a violation of [state law] (J.S. 9A, para. 40).

The F.O.I.C. nullified the dismissal, not for the reasons claimed by Petrowski, but because (1) the notice of the July 2 meeting was technically improper, (2) the vote (as opposed to deliberations) was not supposed to be in executive session, (3) the minutes did not disclose that findings prepared by the president were voted on by the board, and (4) the board went into executive session without stating the reasons (J.S. 8A, 9A, paras. 36, 41).

On appeal to the Connecticut Superior Court, ground (3) was reversed, but the other grounds were affirmed (J.S. 18A-20A). Norwich Free Academy appealed; Petrowski did not cross appeal. During the pendency of that appeal, the Connecticut Supreme Court decided *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 503 A.2d 1161 (1986), which held that the time requirements in C.G.S. §1-21i(b) were mandatory and the F.O.I.C.'s failure to comply with these requirements deprived it of jurisdiction.

The Appellant is mistaken in her contention that the court *sua sponte* raised the question in this case. Immediately after the *Zoning Board* case decision was issued on February 10, 1986, Norwich Free Academy filed a motion to add the issue decided in the *Zoning Board* case to its appeal (app. 2a-8a). The court then sent notice to all parties that it would decide whether the appeal should be sustained on the basis of the F.O.I.C.'s failure to comply with the mandatory time requirements. The only response made by Petrowski was a brief asserting that the statutory time period should be read in this case as directory rather than mandatory (J.S. 25A-28A). The brief does not explicitly state whether this is a statutory construction claim to avoid a constitutional challenge, or a constitutional claim, or both. Perhaps because she has not claimed that the F.O.I.C. has ever decided a case within 30 days, Petrowski refers to an equal protection issue only in passing. The brief also does not explicitly state what constitution is referred to. The Connecticut Supreme Court ruled in Norwich Free Academy's favor in an order without opinion (J.S. 22A).

When Norwich Free Academy dismissed Petrowski, she took an administrative appeal to the Connecticut Superior Court, alleging a multitude of issues including a violation of the F.O.I. Act (J.S. pp. 30A-32A). The court ruled for Norwich Free Academy on all issues except that it declined to rule on the F.O.I. claim (J.S. 33A-40A). Petrowski appealed to the Connecticut Appellate Court, abandoning all issues (including the F.O.I. claim) except the alleged conflict of interest of two board members (app. 9a). The Appellate Court agreed with Petrowski on the conflict claim, 2 Conn. App. 551, 481 A.2d 1096 (1984), but the Connecticut Supreme Court reversed, 199 Conn. 231, 506 A.2d 139 (1986). Petrowski has not requested review of that ruling in the United States Supreme Court and the judgment is now final.

ARGUMENT

1. Federal Question Insubstantial

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), cannot seriously be relied upon because *Logan* involved a statutory review process specifically set up for an employee to invoke to test the legality of his firing. Unlike *Logan*, the challenged F.O.I.C. statute here did not confer the property right of continued employment. That property right arose from another statute and Petrowski did in fact invoke that statute's review process to test the legality of her firing by appealing to the Connecticut Superior Court; she ultimately lost on the merits before the Connecticut Supreme Court. She does not now question the fairness of that process.

Logan does not involve a collateral proceeding before another agency whose process Petrowski would have no more right to invoke than a disgruntled member of the press or citizen in the community. The Connecticut Supreme Court considered this distinction and found *Logan* inapplicable to the facts of *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 504, note 6, 503 A.2d 1161, 1164-65 (1986). She does not claim that the rights she was deprived of pursuing in the collateral action themselves implicated due process concerns (such as if she in fact did not know of the July 2 meeting). Indeed, if it were otherwise, presumably she would not have abandoned those rights in her direct appeal from the dismissal. The claims she made to the F.O.I.C. were ruled against her and she did not cross appeal. The remaining claims involved technical statutory violations raised by the F.O.I.C. itself. While she has a property right such that she cannot be dismissed without due process of law, she does not have a property right in the enforcement of the F.O.I. Act.

2. Federal Question Improperly Raised

Petrowski's brief before the Connecticut Supreme Court does not explicitly refer to the United States Constitution or the Connecticut Constitution. She does refer to due process and equal protection and she does cite *Logan*. One often cites a decision of this Court in state courts for its persuasive rather than its controlling authority. Citing *Logan* is not by itself a proper raising of a federal claim in a state court, for the presumption is that constitutional claims in state courts concern the state constitution. *Bowe v. Scott*, 233 U.S. 658, 665 (1914).

Nor does her brief make clear whether she is raising a statutory construction claim, a constitutional claim, or both. The ambiguity is important because a different analysis would have been required below depending upon which claim Petrowski was pursuing. The statutory construction analysis — that the 30-day rule should be construed to be directory rather than mandatory in order to avoid a constitutional question — is most consistent with the actual language of Petrowski's brief. The constitutional analysis — that the 30-day rule is mandatory and therefore violates due process — is not made in those terms in Petrowski's brief, nor does she discuss the severability of the 30-day rule from the rest of the statute. The record below fails to show that the federal claim was specifically presented so that the Connecticut Supreme Court could not have given judgment without deciding it. *Louisville & Nashville Railroad Co. v. Louisville*, 166 U.S. 709, 715 (1897).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question and for want of jurisdiction.

APPELLEE, NORWICH FREE ACADEMY

By _____

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APPENDIX

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Freedom of Information
Commission
30 Trinity St.
Hartford, CT 06115

74 West Main Street
P.O. Box 940
Norwich, CT 06360
July 30, 1981

Dear Sir or Madam:

My name is Deborah H. Benson. I am an attorney representing Mary Petrowski. My office phone number is 889-8471.

Mrs. Petrowski was involved in a hearing held pursuant to CONN. GEN. STAT. §10-151. She is a tenured teacher. Her employer, The Norwich Free Academy, terminated her employment contract by decision rendered July 2, 1981. Mrs. Petrowski requested a non-public hearing. Hearings were held May 21, 1981 and June 17, 1981. The Board of Trustees, who held the meetings, indicated that they would meet on June 30, 1981 in executive session to decide her case. As her attorney, I requested that Mrs. Petrowski and I be allowed to be present at the June 30, 1981 meeting. We were not so allowed, and in fact are not positive where or when the meeting took place. I believe this is in violation of CONN. GEN. STAT. §1-18a(e).

Therefore, I request a hearing pursuant to CONN. GEN. STAT. §1-21i.

If you so request, I shall be happy to supply the names and addresses of the 12 Trustees. Their chairman is James J. Dutton, Attorney, 22 Shetucket St., Norwich, CT 06360.

Very truly yours,
/s/ Deborah H. Benson

[original in manuscript]

NO. 12809
NORWICH FREE ACADEMY : SUPREME
vs. : COURT
FREEDOM OF INFORMATION : FEBRUARY 10,
COMM. ET AL : 1986

MOTION FOR LEAVE TO FILE AN AMENDED PRELIMINARY STATEMENT OF ISSUES AND TO FILE A SUPPLEMENTAL BRIEF

The plaintiff hereby moves for leave to file an amended preliminary statement of issues to add the following issue:

4. Did the FOIC violate the mandatory time requirements set out in C.G.S. §1-21i(b), thereby lacking jurisdiction to issue its February 23, 1983 decision?

The plaintiff also moves for leave to file the attached short supplemental brief on this issue.

PLAINTIFF, NORWICH FREE ACADEMY

By /s/ ALEXANDRA DAVIS

ALEXANDRA DAVIS
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, Connecticut 06105

Its Attorneys

ORDER

For good cause shown, the foregoing is hereby GRANTED/DENIED.

By the Court,

_____

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

NO. 12809		
NORWICH FREE ACADEMY	:	SUPREME
vs.	:	COURT
FREEDOM OF INFORMATION		FEBRUARY 10,
COMM. ET AL	:	1986

SECTION 3098 STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED PRELIMINARY STATEMENT OF ISSUES AND TO FILE A SUPPLEMENTAL BRIEF

1. Brief History

Upon the decision of NFA to terminate her employment, defendant Petrowski filed a complaint with the defendant FOIC. NFA appealed the decision of the FOIC to the Superior Court. The Superior Court dismissed NFA's appeal, and from that dismissal NFA filed this appeal to the Appellate Court, and the Supreme Court then transferred it to itself.

2. Specific Facts

The plaintiff filed its brief on December 6, 1985. The defendants have yet to file their briefs, having obtained an extension of time for such filing to February 13, 1986. Furthermore, the Defendant FOIC has filed a motion for additional extension of time until March 14, 1986.

On February 4, 1986, the Supreme Court issued a decision in *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, A.2d (1985), and the holding is relevant to this appeal.

3. Legal Grounds

The issue the plaintiff seeks to add is whether the FOIC violated the statutory time requirements of C.G.S. 1-21i(b) and therefore lacked jurisdiction to render its order declaring null and void the actions of the plaintiff.

In *Zoning Board of Appeals v. Freedom of Information Commission, supra* at 505, this Court held the time requirements of C.G.S. §1-21i(b) go "to the essence of the act" and are therefore mandatory. In so holding, this Court said:

> We are persuaded that the legislature intended that the failure of the FOIC to comply with the time limits for the hearing and adjudication of a complaint would nullify its subsequent action.

Id. at 505

In this appeal, from the face of the record alone, the issues of the statutory time requirements for action by the defendant FOIC is clearly discernible. In addition, the plaintiff's brief encompasses the necessary factual background for deciding this issue. Thus, no substantial briefing will be required on this issue. The plaintiff would submit no additional factual statement and would file the attached brief immediately after the Court grants leave.

This motion is not untimely. The issue to be added is jurisdictional, and can be raised at any stage of the judicial proceedings, including on appeal. *Circle Lanes of Fairfield, Inc. v. Fay*, 195 Conn. 534, 540, 489 A.2d 363 (1985); *Tucker v. Maher*, 192 Conn. 460, 469, 472 A.2d 1261 (1984). *Cf. Equitable Trust Co. v. Plume*, 92 Conn. 649, 657, 103 A. 940 (1918); *Wheeler v. New York, N.H. & H.R. Co.*, 71 Conn. 270, 282, 41 A. 808 (1898); *Olmsted's Appeal from Probate*, 43 Conn. 110, 114-15 (1875) ("If the information [concerning jurisdiction] does not come early, it must not be rejected if it comes late.")

The issue to be added is necessary to the just disposition of this appeal and its inclusion will not unfairly prejudice the defendants. In fact, since they have filed Motions for

Extension of Time, it should not cause delay in the progress of this appeal. The Motion to Amend the Preliminary Statement of Issues and to file a Supplemental Brief should be granted.

PLAINTIFF, NORWICH FREE ACADEMY

By ALEXANDRA DAVIS

ALEXANDRA DAVIS OF
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, Connecticut 06105
Its Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1985.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

[Proposed Supplemental Brief]
(To be Printed)

SUPPLEMENTAL ARGUMENT

4. The FOIC violated the mandatory time requirements set out in C.G.S. §1-21i(b) and therefore lacked jurisdiction to issue its February 23, 1983 decision.

While this issue was not specifically raised on the appeal to the Superior Court, the plaintiff is not barred from raising it now. All of the necessary facts to determine this issue were before the trial court and have been set out in the brief filed December 6, 1985. Most significantly, this

issue is one of jurisdiction and thus can be raised on appeal. As this court noted recently:

> Initially we must address the defendant's contention that the plaintiff had no right to appeal the action of the board and, hence, that the court had no jurisdiction. "The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage of the proceedings. Practice Book §3110. If at any point it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." *Laurel Park, Inc. v. Pac*, 194 Conn. 677, 678-79, n.1, S.2d (1984). If we conclude that the court lacks jurisdiction, it will be unnecessary to reach the merits of this appeal. See, e.g., *State v. Parker*, 194 Conn. 650, 657 N.7, A.2d (1984).

Neyland v. Board of Education, 195 Conn. 174, 487 A.2d 181 (1985).

In a decision that same year, the Court heard and decided an issue of jurisdiction even though the party had abandoned the argument. *Circle Lanes of Fairfield, Inc. v. Fay*, 195 Conn. 534, 540, 489 A.2d 363 (1985). This Court can and should decide an issue of jurisdiction even at this stage of the proceedings.

C.G.S. §1-2l(i)(g) reads in pertinent part:

> Said commission shall, within twenty days after receipt of the notice of appeal, hear such appeal after due notice to the parties and shall decide the appeal within thirty days after such hearing, by confirming the action of the agency or ordering the agency to comply forthwith with such relief as the commission, in its sound discretion, believes appropriate to rectify the denial of any right conferred by said sections.

In a case decided since the filing of the plaintiff's brief, this Court held that the time requirements set out in C.G.S. §1-21i(b) were mandatory and in so holding found:

> We are persuaded that the legislature intended that the failure of the FOIC to comply with the time limits for the hearing and adjudication of a complaint would nullify its subsequent action.

Zoning Board of Appeals v. Freedom of Information Commission, 198 Conn. 498, 505, A.2d (1986).

The defendant Petrowski filed her complaint with the FOIC on July 30, 1981 (br. 2). The FOIC held its first day of hearing on November 23, 1981, nearly four months after the complaint was filed (br. 2). On February 23, 1983, the FOIC rendered its final decision (br. 8). This was 1 year and 7 months after the complaint was filed and 1 year and 2 months after the hearing was concluded (br. 2, 8).

The failure to comply with a statutory deadline in an administrative proceeding deprives the agency of jurisdiction and renders the action taken null and void. *Akin v. Norwalk*, 163 Conn. 68, 74, 301 A.2d 258 (1972); *Donahue v. Zoning Board of Appeals*, 155 Conn. 550, 554, 235 A.2d 643 (1967). *Cf. Basilicato v. Department of Public Utility Control*, 197 Conn. 320, 497 A.2d 48 (1985) (failure to follow statutory requirements for appeal deprives the Court of jurisdiction to hear it.)

The failure of the FOIC to follow the statutory time requirements was blatant and substantial and such failure renders the February 23, 1983 decision null and void.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS

ALEXANDRA DAVIS

NO. 12809		
NORWICH FREE ACADEMY	:	SUPREME COURT
vs.	:	JUDICIAL DISTRICT OF NEW LONDON
FREEDOM OF INFORMATION COMM., ET AL	:	FEBRUARY 10, 1986

AMENDED PRELIMINARY STATEMENT OF ISSUES

1. Does the Freedom of Information Act apply to Norwich Free Academy?

2. Were Norwich Free Academy's statutory and due process rights violated when the Commission made findings on issues neither alleged in the complaint nor addressed in the evidentiary hearing?

3. Did the Commission violate C.G.S. §4-179 or otherwise abuse its discretion, or act arbitrarily, by declaring the action of Norwich Free Academy null and void?

4. Did the FOIC violate the mandatory time requirements set out in C.G.S. §1-21i(b), thereby lacking jurisdiction to issue its February 23, 1983 decision?

PLAINTIFF, NORWICH FREE ACADEMY

By: /s/ ALEXANDRA DAVIS

ALEXANDRA DAVIS of
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT 06105

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

[From Connecticut Supreme Court Record of *Petrowski v. Norwich Free Academy, et al.*, No. 12622]

STATEMENT OF THE ISSUE

[From Plaintiff's Appellate Court Brief]

1. Did the defendant knowingly and willfully violate the plaintiff's rights to due process under Connecticut General Statutes §10-151 and the Fourteenth Amendment to the United States Constitution when Trustees Dutton and Tillinghast participated in the hearing and decision although they were disqualified?